

**STATE OF NEW MEXICO  
BEFORE THE SECRETARY OF THE ENVIRONMENT**

<b>IN THE MATTER OF THE APPLICATION OF BULLDOG COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8153-M1</b>	<b>AQB 21-31</b>
<b>IN THE MATTER OF THE APPLICATION OF JAYHAWK COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8152-M1</b>	<b>AQB 21-32</b>
<b>IN THE MATTER OF THE APPLICATION OF LONGHORN COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 8349-M2</b>	<b>AQB 21-33</b>
<b>IN THE MATTER OF THE APPLICATION OF COWBOY CDP (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7877-M1</b>	<b>AQB 21-34</b>
<b>IN THE MATTER OF THE APPLICATION OF WILDCAT COMPRESSOR STATION (XTO ENERGY) FOR AN AIR QUALITY PERMIT, NO. 7474-M2</b>	<b>AQB 21-35</b>
<b>IN THE MATTER OF THE APPLICATION OF ZIA HILLS CENTRAL FACILITY (CONOCOPHILLIPS) FOR AN AIR QUALITY PERMIT, NO. 7746-M8</b>	<b>AQB 21-36</b>
<b>IN THE MATTER OF THE APPLICATION OF ZIA HILLS CENTRAL FACILITY (CONOCOPHILLIPS) FOR AN AIR QUALITY PERMIT, NO. 7746-M8</b>	<b>AQB 21-36</b>
<b>IN THE MATTER OF THE APPLICATION MAVERICK COMPRESSOR STATION (XTO) FOR AN AIR QUALITY PERMIT, NO. 7565-M2</b>	<b>AQB 21-39</b>

**IN THE MATTER OF THE APPLICATION  
SPARTAN COMPRESSOR STATION  
(XTO) FOR AN AIR QUALITY PERMIT,  
NO. 7681-M2**

**AQB 21-40**

**IN THE MATTER OF THE APPLICATION  
TIGER COMPRESSOR STATION  
(XTO) FOR AN AIR QUALITY PERMIT,  
NO. 7623-M2**

**AQB 21-41**

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**THE AIR QUALITY BUREAU’S AMENDED BRIEF IN SUPPORT OF HOLDING A  
VIRTUAL HEARING**

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COMES NOW, the Air Quality Bureau (“Bureau”), within the Environmental Protection Division (“Division”) of the New Mexico Environment Department (“Department”), and respectfully submits this Brief in Support of Holding a Virtual Hearing in the above captioned matters.

**I. A VIRTUAL HEARING CAN PROVIDE MORE ROBUST DUE PROCESS THAN AN IN-PERSON HEARING**

The Air Quality Control Act (“Act”), NMSA 1978, §§ 74-2-1 to -17 (1967 as amended through 2019), does not mandate where public hearings are to be held. The Air Quality Construction Permit Rules (“Rules”) state that public hearings “shall be held in the geographic area likely to be impacted by the source.” 20.2.72.206(C) NMAC. However, the Rules were last updated in June 2002, nearly twenty years ago. Since that time, the widespread public use of personal computers and the internet have become the norm, but New Mexico’s Air Quality Rules have not been updated to reflect this change.

The intent of the “geographic area” requirement in 20.2.72.206(C) NMAC is to ensure that residents in the impacted areas are able to attend the hearing and have their comments and questions heard and responded to. The Rules mandate that members of the public “have an opportunity to examine witnesses at the hearing,” and an opportunity to “provide a general written statement concerning the Draft Permit, Application, or Petition at or before the hearing.” 20.1.4.300(B)(2) and 20.1.4.400(B)(2) NMAC. These are a due process protections.

The New Mexico Supreme Court has held that “an essential goal of public hearings during the permitting process is to provide community members the opportunity to ask questions, offer their own technical evidence, cross-examine witnesses, and make nontechnical statements.” *In re Rhino Envtl. Servs.*, 2005-NMSC-024, ¶2, 138 N.M. 133 (internal citation and quotation marks omitted). The Court further held that it must “construe the permit procedures to facilitate meaningful participation by members of the public.” *Id.* at ¶ 42. It is settled law that “the opportunity to be heard should be at a meaningful time and in a meaningful manner.” *TW Telecom of N.M., L.L.C. v. N.M. Pub. Regulation Comm’n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12 (internal citations and quotation marks omitted).

Holding a virtual hearing in this matter fulfills the intent of 20.2.72.206(C) NMAC and offers more robust due process protections to residents of the impacted areas. The spread of COVID-19 infections in New Mexico and the resulting Public Health Orders forced state agencies, including the Department, to implement virtual platforms to conduct public hearings. The results have been positive. Department-wide, there has been a general increase in the number of members of the public participating in public hearings. In some cases, the increase has been dramatic, with up to 100 members of the public participating in a single hearing. It is reasonable to conclude that

the increase in public participation in public hearings was due, in large part, to the greater access afforded to the public when hearings are held on a virtual platform. Although the Public Health Orders prohibiting mass gatherings are no longer in effect, holding a virtual hearing in these matters can provide for more robust due process and greater access to the public for the reasons set forth below.

**A. The Bureau Will Provide an Option for In-Person Attendance in the Impacted Area**

In addition to the virtual platform, the Bureau will provide adequate facilities in the impacted areas for interested members of the public to attend the virtual hearing. The Bureau will provide a public space, likely at Department field offices, where members of the public can use a Department computer, camera, and screen to view and participate in the virtual hearing. In addition, the Department will provide *wi-fi* connections to those members of the public who chose to bring their own devices. The locations will be included in the public notice and posted on the Bureau's website. The combination of a virtual hearing and in-person locations in the impacted areas will provide greater access to the public hearing than if the hearing were held in-person. And because all who attend the virtual hearing will have the opportunity to give comment, ask questions, and examine witnesses, participation will be meaningful.

**B. It is Uncertain That In-Person Hearings Will be Permitted in Mid-November**

Although the Public Health Orders that prohibited mass gatherings are no longer in effect, the proliferation of the Delta Variant of the SARS-CoV-2 virus is driving New Mexico's incidences of COVID-19 infections.<sup>1</sup> From July 24 to July 30, 2021, New Mexico reported 1,935

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<sup>1</sup> Yale Medicine, "5 Things to Know About the Delta Variant," <https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid> (accessed 8/2/21).

new cases of COVID-19.<sup>2</sup> Nationally, the week of July 26, 2021 saw the number of new cases rise above 100,000 in a single day for the first time since February 11, 2021.<sup>3</sup> In addition, the Delta Variant is both more contagious and more likely to cause infections that require hospitalization.<sup>4</sup> As if the data above was not troubling enough, on July 30, 2020, the Centers for Disease Control and Prevention released the results of a study indicating that large public gatherings can be sites for breakthrough infections, where fully vaccinated individuals contract and spread the Delta Variant.<sup>5</sup>

Given the continued spread of SARS-CoV-2, it is reasonable to assume that in-person hearings may not be permitted by November of this year. It is also reasonable to assume that large numbers of New Mexicans may not be willing to risk attending an in-person hearing when vaccination provides questionable protection in a mass gathering. There is the possibility that holding an in-person hearing in these matters *decreases* the ability to meaningfully participate by shutting out those individuals who are wary of attending a mass gathering, and those individuals who have compromised immunity or are otherwise vulnerable.

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<sup>2</sup> New Mexico Department of Health, *Newsroom* <https://www.nmhealth.org/news/awareness/2021/> (accessed 8/2/21).

<sup>3</sup> *Washington Post*, “Coronavirus: US Map” [https://www.washingtonpost.com/graphics/2020/national/coronavirus-us-cases-deaths/?itid=sf\\_coronavirus\\_sn\\_coronavirus-us-cases-deaths\\_1](https://www.washingtonpost.com/graphics/2020/national/coronavirus-us-cases-deaths/?itid=sf_coronavirus_sn_coronavirus-us-cases-deaths_1) (accessed 8/2/21).

<sup>4</sup> Yale Medicine, “5 Things to Know About the Delta Variant,” <https://www.yalemedicine.org/news/5-things-to-know-delta-variant-covid> (accessed 8/2/21); American Society for Microbiology, “How Dangerous is the Delta Variant (B.1.612.2)?,” <https://asm.org/Articles/2021/July/How-Dangerous-is-the-Delta-Variant-B-1-617-2> (accessed 8/2/21).

<sup>5</sup> Centers for Disease Control and Prevention, “Outbreak of SARS-CoV-2 Infections, Including COVID-19 Vaccine Breakthrough Infections, Associated with Large Public Gatherings — Barnstable County, Massachusetts, July 2021,” [https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s\\_cid=mm7031e2\\_w](https://www.cdc.gov/mmwr/volumes/70/wr/mm7031e2.htm?s_cid=mm7031e2_w) (accessed 8/2/21).

## II. CONCLUSION

For the reasons set forth above, the Bureau asserts that holding a virtual hearing can provide more robust due process protections and greater public participation than in-person hearings in the above captioned matters.

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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Brief in Support of a Virtual Hearing was served by email on the following on August 2, 2021:

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